

DJW/bh

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

LOVETTA A. CROSS,

Plaintiff,

Civil Action

v.

No. 02-2286-DJW

COMMISSIONER OF SOCIAL SECURITY,

Defendant

MEMORANDUM AND ORDER

Plaintiff seeks judicial review, pursuant to 42 U.S.C. §§ 405(g), of the final decision of Defendant Commissioner of the Social Security Administration (“Commissioner”) denying her application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401, *et seq.* The parties have filed their consent to jurisdiction by Magistrate Judge (doc. 9) pursuant to 28 U.S.C. § 636(c)(1) and Fed. R. Civ. P. 73. Plaintiff has filed a brief (doc. 13) seeking judicial review of the Commissioner’s decision. The Commissioner has filed a brief in opposition (doc. 14).

The Court has reviewed the administrative record and the parties’ briefs. As set forth below, the Court reverses the decision of the Commissioner and remands the case to the Administrative Law Judge for further proceedings consistent with this decision.

I. Standard of Review

Pursuant to 42 U.S.C. § 405(g), a court may render “upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” The court reviews the decision of

the Commissioner to determine whether the record as a whole contains substantial evidence to support the Commissioner's decision.¹ "Substantial evidence" is "more than a mere scintilla" and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² In reviewing the record to determine whether substantial evidence supports the Commissioner's decision, the court may neither reweigh the evidence nor substitute its discretion for that of the Commissioner.³ Evidence is not considered substantial "if it is overwhelmed by other evidence — particularly certain types of evidence (e.g., that offered by treating physicians) or if it really constitutes not evidence but mere conclusion."⁴

The court also reviews the decision of the Commissioner to determine whether the Commissioner applied the correct legal standards.⁵ The Commissioner's failure to apply the proper legal standard may be sufficient grounds for reversal independent of the substantial evidence analysis.⁶ Accordingly, the court reviews the decision of the Commissioner to determine whether

¹*Castellano v. Sec'y of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994).

²*Richardson v. Perales*, 402 U.S. 389, 401 (1971).

³*Qualls v. Apfel*, 206 F.3d 1368, 1371 (10th Cir. 2000) (citing *Casias v. Sec'y of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991)).

⁴*Knipe v. Heckler*, 755 F.2d 141, 145 (10th Cir. 1985) (quoting *Kent v. Schweiker*, 710 F.2d 110, 114 (3rd Cir. 1983)).

⁵*Glass v. Shalala*, 43 F.3d 1392, 1395 (10th Cir. 1994); *Washington v. Shalala*, 37 F.3d 1437, 1439 (10th Cir. 1994).

⁶*Glass*, 43 F.3d at 1395 (citing *Thompson v. Sullivan*, 987 F.2d 1482, 1487 (10th Cir. 1993)).

the record as a whole contains substantial evidence to support the Commissioner's decision and to determine whether the correct legal standards were applied.⁷

II. Procedural History

On January 12, 2000, Plaintiff filed an application for disability insurance benefits under Title II. (*See* Certified Transcript of the Record ("Tr.") at 60-62.) The Commissioner denied the claim initially and upon reconsideration. (Tr. 18, 20-24) On December 3, 2001, the Administrative Law Judge ("ALJ") conducted a hearing on Plaintiff's claim. (Tr. 180- 206) Plaintiff appeared at the hearing in person and with her attorney. (Tr. 180)

On February 6, 2002, the ALJ issued his decision, in which he concluded that Plaintiff is not disabled within the meaning of the Social Security Act and therefore not entitled to receive disability insurance benefits. (Tr. 12-17) In reaching this conclusion, the ALJ determined that Plaintiff's impairments do not prevent her from performing sedentary work that exists in significant numbers in the national economy, including employment as a security system monitor, information clerk, and telephone solicitor. (Tr. 15, 17, 204)

On March 10, 2002, Plaintiff requested a review of the hearing decision by the Appeals Council. (Tr. 7-8) The Appeals Council denied the request for review on April 23, 2003. (Tr. 5-6) The findings of the ALJ therefore stand as the final decision of the Commissioner in this case.

Plaintiff alleges in her application for disability insurance benefits that she became disabled and eligible to receive benefits on September 30, 1999. (Tr. 60) Plaintiff claims that she is disabled due to rheumatoid arthritis. (Tr. 75-76)

⁷*Hamilton v. Sec'y of Health & Human Servs.*, 961 F.2d 1495, 1497 (10th Cir. 1992).

At the time of the hearing before the ALJ, Plaintiff was forty-one years of age. (Tr. 184) She has graduated from high school and licensed practical nurse ('LPN') school. (Tr. 184) After completing LPN school, she attended college, earning approximately 60-70 college credit hours. (Tr. 184) Plaintiff's past relevant work includes work as a cashier, receptionist, cook, and LPN. (Tr. 185-87)

III. The ALJ's Findings

In his decision of February 6, 2002, the ALJ made the following findings:

1. Claimant met the special earnings requirement of the Act on September 30, 1999, the date she stated she became unable to work, and continues to do so through the date of this decision.
2. Claimant has not engaged in substantial gainful activity at any time since September 30, 1999.
3. Medical evidence establishes that claimant has a history of rheumatoid arthritis with complaints of residual pain in multiple anatomical areas and non-severe depression, but she does not have an impairment or combination of impairment listed in Appendix 1, Subpart P, Regulations No. 4.
4. Claimant's testimony as to the severity of her impairment and attending symptoms is found to be no more than partially credible. Her testimony is inconsistent with the objective medical evidence, the substantial evidence contained in the residual functional capacity assessments and the opinions of treating, examining and reviewing physicians of record as well as the lack of any adverse side effects from any medications on a significant sustained basis, claimant's activities of daily living and for the other reasons set forth in the Rationale section of this decision.
5. Claimant has at all times retained a residual functional capacity for a wide range of sedentary work where she can lift and carry 10 pounds maximum occasionally with lesser weights on an [sic] more frequent basis. She can stand and walk for 15 minutes at a time for 2 of 8 hours and sit for 6 of 8 hours. She cannot work on ladders or scaffolding, in extremes of heat or cold and cannot rapidly and repetitively use her hands and arms. She can only occasionally stoop, kneel, crouch, crawl or climb stairs.

6. Claimant is incapable of performing any of her past relevant work and has no transferable skills.
7. Claimant is 41 years old, which is defined as a “younger individual.”
8. Claimant has a high school education.
9. Based on an exertional capacity work for a wide range of sedentary work and claimant’s age, education and work experience, Section 404.1569 and the framework of Rule 201.28, Table No. 1, Appendix 2, Subpart P, Regulations No. 4 indicates that a conclusion of not disabled is appropriate.
10. Although claimant has some non-exertional pain, using the above-cited rule as a framework for decision making, there are a significant number of jobs in the economy that she can nonetheless perform, the numbers and identities of which were set forth by the vocational expert at the time of claimant’s hearing, specifically set forth their numbers and identities [sic].
11. Claimant has not been under a “disability” as defined in the Social Security Act, as amended, at any time through the date of this decision.

(Tr. 16-17)

IV. Analysis

A. Introduction

To qualify for disability benefits, a claimant must establish a severe physical or mental impairment that is expected to result in death or to last for a continuous period of twelve months and which prevents the claimant from engaging in substantial gainful activity.⁸ The Commissioner has established a five-part sequential evaluation process for determining disability.⁹ If at any step in the process the Commissioner determines that the claimant is either disabled or not disabled, the

⁸42 U.S.C. § 423(d)(1)(A).

⁹See *Thompson v. Sullivan*, 987 F.2d 1482, 1486 (10th Cir. 1993) (citing 20 C.F.R. §§ 404.1520(a)-(f), 416.920); *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir.1988) (discussing the five steps in detail)).

evaluation ends.¹⁰ In step one, the Commissioner determines whether the claimant is engaged in substantial gainful activity at the time of the determination.¹¹ Step two considers whether the claimant has a medically severe impairment or combination of impairments that “significantly limits his[her] ability to do basic work activities.”¹² In step three, the Commissioner “determines whether the impairment is equivalent to one of a number of listed impairments that the [Commissioner] acknowledges are so severe as to preclude substantial gainful activity.”¹³ If the claimant has a listed impairment or its equivalent, the claimant is conclusively presumed to be disabled and is entitled to benefits.¹⁴ If not, the Commissioner must continue to the fourth step, which determines whether the claimant has shown that the impairment prevents the claimant from performing work he/she has performed in the past.¹⁵ If the claimant is able to perform his/her past work, the claimant is not disabled. If, on the other hand, the claimant is unable to perform such work, the Commissioner must proceed to step five and determine whether the claimant has the residual functional capacity (RFC) in light of his/her age, education, and work experience, to perform other work in the national economy.¹⁶ The claimant has the burden of proof at steps one through four, but the burden shifts to the Commissioner at step five.

¹⁰*Thompson*, 987 F.2d at 1487 (citations omitted).

¹¹*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988)

¹²*Id.* at 750-51.

¹³ *Id.* at 751 (citation omitted).

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

Applying the first four steps of the test, the ALJ in this case determined that Plaintiff was not presently engaged in any substantial gainful activity, that she has a severe impairment, but one which does not meet any of the listings, and that her impairment prevents her from returning to her past relevant work. (Tr. 16-17)

Because Plaintiff met her burden of proof on the first four steps, she established a *prima facie* case of disability.¹⁷ The burden of proof therefore shifted to the Commissioner at step five to show that Plaintiff retains the RFC to do other work that exists in the national economy.¹⁸ At step five the ALJ determined that a significant number of sedentary jobs exists in the economy which Plaintiff can perform and that she is therefore not disabled. (Tr. 17) Plaintiff now appeals certain conclusions that the ALJ made at step five.

B. Did the ALJ Improperly Rely on the Grids?

Plaintiff first argues that the ALJ erred at step five by relying on the Medical Vocational Guidelines¹⁹ (the “grids”) to determine that Plaintiff is not disabled. Plaintiff asserts that the ALJ is not permitted to conclusively rely on the grids because Plaintiff suffers from nonexertional impairments.²⁰

¹⁷*See id.*

¹⁸*See id.*

¹⁹*See* 20 C.F.R. Pt. 404, Subpt. P., App. 2

²⁰Plaintiff’s claimed non-exertional impairments include, *inter alia*, pain, fatigue, loss of manual dexterity, and mental impairments caused by depression).

The grids contain tables of rules that direct a determination of disabled or not disabled on the basis of a claimant's RFC category, age, education, and work experience.²¹ The grids, however, "may not be applied conclusively in a given case unless the claimant's characteristics precisely match the criteria of a particular rule."²² Application of the grids is particularly inappropriate when the ALJ is evaluating nonexertional limitations such as disabling pain or mental impairments.²³

Plaintiff is thus correct when she asserts that the ALJ may not conclusively rely on the grids if she suffers from any non-exertional limitations. Plaintiff, however, ignores an exception to this general rule. The exception allows the ALJ to use the grids as a "framework" for evaluating disability when non-exertional impairments are present, and when combined with evidence such as testimony from a vocational expert, the grids may be used to support a finding of nondisability.²⁴

Here, the ALJ did not rely solely on the grids. He expressly stated that he was using the grids only as a "framework for decision making" (Tr. 17), and he went on to cite the vocational expert's testimony that a significant number of jobs exist in the economy which a person with Plaintiff's limitations and non-exertional impairments can perform (Tr. 17). In addition, the ALJ made it clear in the body of his decision that he was relying on the vocational expert's testimony in concluding that Plaintiff is not disabled. (Tr. 15) As the ALJ followed the required procedure, he committed no error in this regard.

²¹*Thompson*, 987 F.2d at 1487 (citing 20 C.F.R. Pt. 404, Subpt. P, App. 2).

²²*Thompson*, 987 F.2d at 1487 (citations omitted). *Accord* 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(a) & Table No. 1; Social Security Ruling 82-41, 1982 WL 31389, at *1.

²³*Glass v. Shalala*, 43 F.3d 1392, 1396 (10th Cir. 1994); *Thompson*, 987 F.2d at 1488; *Hargis v. Sullivan*, 945 F.2d 1482, 1490 (10th Cir. 1991)

²⁴*See Thompson*, 987 F.2d at 1488; *Hargis*, 945 F.2d at 1490; *Huston v. Bowen*, 838 F.2d 1125, 1131-32 (10th Cir. 1988).

C. Is the ALJ's RFC Assessment Supported by Substantial Evidence?

Plaintiff next argues that the ALJ's RFC assessment is not supported by substantial evidence. More specifically, Plaintiff argues that the ALJ ignored the opinions of her treating physicians as to Plaintiff's abilities and improperly relied on the opinions of the state agency consultants who completed the physical and mental RFC assessments of Plaintiff. Plaintiff also contends that the ALJ improperly excluded certain limitations from his RFC determination.

1. The ALJ's findings with respect to Plaintiff's RFC

The ALJ found that Plaintiff "has at all times retained a residual functional capacity for a wide range of sedentary work." (Tr. 16) He further found that she has the following limitations:

[S]he can lift and carry 10 pounds maximum occasionally with lesser weights on an [sic] more frequent basis. She can stand and walk for 15 minutes at a time for 2 of 8 hours and sit for 6 of 8 hours. She cannot work on ladders or scaffolding, in extremes of heat or cold and cannot rapidly and repetitively use her hands and arms. She can only occasionally stoop, kneel, crouch, crawl or climb stairs.

(Tr. 16)

2. Applicable law and Social Security Ruling 96-8p

Social Security Ruling 96-8p sets forth the Commissioner's policies and policy interpretations regarding the assessment of a claimant's RFC.²⁵ The Ruling, which is binding on the ALJ,²⁶ defines "RFC" as "an administrative assessment of the extent to which an individual's medically determinable impairment(s), including any related symptoms, such as pain, may cause

²⁵Soc. Sec. Rul. 96-8p, 1996 WL 374184, at *1 (July 2, 1996).

²⁶All Social Security Rulings are "binding on all components of the Social Security Administration" and "represent precedent final opinions and orders and statements of policy and interpretations" that the Social Security Administration has adopted. 20 C.F.R. § 402.35(b)(1).

physical or mental limitations or restrictions that may affect his or her capacity to do work-related physical and mental activities.”²⁷

The Ruling requires that the ALJ’s RFC assessment be based on all of the relevant evidence in the case, including medical history, medical signs and laboratory findings, the effects of treatment, reports of daily activities, medical source statements, and the effects of symptoms, including pain, that are reasonably attributed to the claimant’s medically determinable impairments.²⁸ It further provides that the ALJ must give “[c]areful consideration . . . to any available information about symptoms because subjective descriptions may indicate more severe limitations or restrictions than can be shown by objective medical evidence alone.”²⁹ Further, the RFC must address both the remaining exertional and nonexertional capacities of the individual.³⁰ “Exertional capacity” addresses the claimant’s limitations and restrictions of physical strength and defines the claimant’s abilities to perform each of seven strength demands: sitting, standing, walking, lifting, carrying, pushing, and pulling.³¹ “Non-exertional capacity,” on the other hand, considers all work-related limitations and restrictions that do not depend on an individual’s physical strength, *e.g.*, the claimant’s manipulative and mental abilities.³²

²⁷Soc. Sec. Rul. 96-8p, 1996 WL 374184, at *2.

²⁸*Id.* at *5.

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²*Id.*

Finally, the RFC assessment must consider and address medical opinions from treating sources.³³ Medical opinions are entitled to special significance and may be entitled to controlling weight.³⁴ If a treating source's medical opinion regarding the nature and severity of an individual's impairments is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record, the ALJ must give it controlling weight.³⁵

3. *Specific points of error as to RFC*

The Court will now proceed to analyze the specific points of error that Plaintiff raises with respect to the ALJ's determination of Plaintiff's RFC.

a. *Plaintiff's ability to sit*

Plaintiff first asserts that the ALJ's determination that Plaintiff can sit for six hours in an eight-hour day is supported only by the agency reviewing doctors' RFC, is contrary to the opinions of Plaintiff's treating physicians, and is not supported by the medical evidence.

The Court does not agree. None of Plaintiff's treating or examining physicians expressed any opinion regarding Plaintiff's ability to sit. The physician who completed a physical RFC assessment of Plaintiff, N. Bemmer, M.D., found, based on his review of all of the evidence in the record, that Plaintiff is capable of sitting for about six hours in an eight-hour workday. (Tr. 145-46) Dr. Bemmer's RFC assessment was affirmed by another reviewing physician, M. Stockwell, M.D. (Tr. 152) As there was no medical or other objective evidence contradicting the conclusion contained

³³*Id.* at *7.

³⁴*Id.*

³⁵*Id.*

in Dr. Bemer's RFC assessment, the ALJ properly relied upon it in finding that Plaintiff is capable of sitting for six hours. The Court therefore holds that no error occurred in this regard.

b. Plaintiff's ability to walk and stand

Plaintiff makes similar assertions regarding the ALJ's determination that Plaintiff is capable of standing and walking for fifteen minutes at a time for two hours out of the eight-hour workday. (See Tr. 16.) She contends that this determination is not supported by the medical evidence and is contrary to the opinions of her treating physicians. Again, the Court does not agree with Plaintiff.

Dr. Bemer determined in his RFC assessment that Plaintiff can "[s]tand and/or walk (with normal breaks) for a total of at least 2 hours in an 8-hour workday." (Tr. 146) His determination was based on his review of Plaintiff's medical records and on specific information he received from two of Plaintiff's treating physicians, John S. Sinnott, D.O, and Steve Dillon, M.D. (See Tr. 147.) Dr. Bemer states in his RFC assessment that Doctors Sinnott and Dillon were "recontacted" and that "both agree Claimant can walk & stand up to 2 hrs."³⁶ (Tr. 147) The medical records do not reflect that either Dr. Sinnott or Dr. Dillon ever provided any contrary opinion regarding Plaintiff's ability to walk and stand.³⁷ Nor is there any evidence from any other treating source regarding Plaintiff's ability to walk and stand.

³⁶The fact that Drs. Sinnott and Dillon were "recontacted" is established in an April 6, 2000 letter from Pamela Jones, Disability Claims Manager, to Dr. Dillon. Ms. Jones' letter indicated that she had spoken with Dr. Sinnott earlier that week and that Dr. Sinnott had opined Plaintiff can walk and stand up to two hours (with regular breaks) in an eight-hour day. (Tr. 126) Ms. Jones asked Dr. Dillon what limitations, if any, Plaintiff had in walking and standing. Dr. Dillon responded, writing directly on Ms. Jones' letter, that he agreed with Dr. Sinnott's opinion. (Tr. 126)

³⁷Dr. Sinnott does state in a February 2000 letter that Plaintiff has "weakness in the lower extremities with some swelling of the ankles and knees and bilateral foot pain with prolonged walking." (Tr. 123) He does not, however, offer in this letter any opinion as to how long Plaintiff is capable of standing or walking.

In sum, the medical evidence in the record indicates that Plaintiff is able to stand and walk for fifteen minutes at a time for two of the eight hours in a workday. There is no medical evidence to the contrary. Thus, the ALJ did not commit error in making his determination regarding Plaintiff's ability to stand and walk.

c. Plaintiff's ability to use her hands

Next, Plaintiff argues that the ALJ erred in impliedly finding that she can perform the manipulative demands of sedentary work when no medical evidence supports such a finding. Plaintiff alleges a manipulative impairment due to her rheumatoid arthritis.

In determining Plaintiff's RFC, the ALJ noted only one limitation with respect to Plaintiff's use of her hands. The ALJ found that Plaintiff "cannot rapidly and repetitively use her hands and arms." (Tr. 16) By making this finding, it could be argued that the ALJ impliedly found that Plaintiff had no other manipulative limitations.

Whether a claimant has manipulative limitations would clearly affect the determination of what jobs Plaintiff can perform. Social Security Ruling 83-14 provides that a limitation of a claimant's ability to use his/her fingers and finger tips to work with small objects "can affect the capacity to perform certain jobs at all levels of physical exertion" and, in some cases, can "severely compromise" an entire range of jobs.³⁸ This appears to be particularly true here. In this case, the ALJ found that Plaintiff can perform a wide range of sedentary work. (Tr. 15, 16) According to Social Security Ruling 83-14, "[m]ost sedentary jobs require good use of the hands and fingers."³⁹ Thus, any significant manipulative limitation of Plaintiff's hands and/or fingers would result in a

³⁸Soc. Sec. Rul. 83-14, 1983 WL 31254, at *2 (1983).

³⁹*Id.* See also Soc. Sec. Rul. 96-9p, 1996 WL 374185, at *8 (July 2, 1996) ("Most unskilled sedentary jobs require good use of both hands and the fingers; i.e., bilateral manual dexterity.")

significant erosion of the sedentary occupational base. Obviously then, the presence of a manipulative impairment would matter greatly to Plaintiff's claim.⁴⁰

The ALJ was required to assess Plaintiff's work-related abilities on a "function-by-function basis."⁴¹ This included the duty to assess Plaintiff's ability to perform manipulative functions.⁴² Here, Plaintiff's treating physician, Dr. John Sinnott, indicated in his February 2000 report that Plaintiff's rheumatoid arthritis has caused Plaintiff to suffer from "swelling, discomfort and advancing disability and deformity of her hands" and "swelling and tightness and weakness in her wrists." (Tr. 123) He further indicated that Plaintiff has "difficulty holding and grasping without pain and weakness." (Tr. 123) In light of this medical information, the ALJ was required to

⁴⁰The Court notes that the vocational expert testified that an individual who has the exertional limitations which the ALJ found Plaintiff possesses could perform the jobs of telephone solicitor and security system monitor. (Tr. 203-204) The telephone solicitor position, however, requires "fingering." *Reece v. Apfel*, 92 F. Supp. 2d 1174, 1182-83 (D. Kan. 2000) (citing Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (1993) at 333). Because the telephone solicitor position requires fingering, this Court has held that it cannot be performed by a claimant who is restricted from making bilateral repetitive hand movements. *Id.* With respect to the security system monitor position, courts have held that it, too, cannot be performed by a claimant who has certain manipulative limitations. *See Kuleszo v. Barnhart*, 232 F. Supp. 2d 44, 55 (W.D. N.Y. 2002) (surveillance system monitor position cannot be performed by claimant with fine manipulation or fingering impairments); *Troy ex rel. Daniels v. Apfel*, 225 F. Supp. 2d 1234, 1240-41 (D. Colo. 2002) (security monitor position requires fingering and handling and therefore cannot be performed by claimant who can only occasionally finger and cannot do handling on a frequent basis). Thus, it would appear that if Plaintiff has any manipulative limitations beyond the ability to make rapid, repetitive hand movements, she would not be able to perform either the telephone solicitor or security system monitor position.

⁴¹*See* Soc. Sec. Rul. 96-8p, 1996 WL 374184, at *1 (July 2, 1996) (citing 20 C.F.R. § 404.1545(b) (in conducting the RFC assessment, the ALJ must first identify the individual's functional limitations and assess the claimant's work-related abilities on a "function-by-function basis").

⁴²20 C.F.R. § 404.1545(b) (Commissioner will assess the claimant's abilities to perform certain physical demands of work activity, such as manipulative functions).

specifically assess whether Plaintiff suffers from any manipulative impairments, in addition to the found inability to rapidly and repetitively move her hands.

The record does not reveal that the ALJ ever made such a specific assessment. The Court must therefore reverse the Commissioner's decision and remand this case so that the ALJ may make a specific finding on this point. If the ALJ determines that the medical evidence is inconclusive, the ALJ should exercise his/her discretionary power to order a consultative examination.⁴³

In making this finding regarding Plaintiff's manipulative limitations, the ALJ is instructed not to rely on the RFC assessment already completed by Dr. Bemer. Dr. Bemer left blank that section of the RFC assessment form which addresses "Manipulative Limitations" (Tr. 148). He made only a handwritten notation stating "limited rapid repetitive tasks." (Tr. 148 (underscore in original)) He failed to check either the "Limited" or Unlimited" box for the categories "Reaching all directions," "Handling (gross manipulation)," "Fingering (fine manipulation)," and "Feeling (skin receptors)". In short, Dr. Bemer's RFC assessment does not indicate whether Plaintiff has the ability to reach, handle, finger, or feel. As a consequence, the ALJ may not rely upon it in determining whether Plaintiff has any of these limitations.

If, on remand, the ALJ determines that Plaintiff does in fact suffer from additional manipulative limitations then the ALJ must take those additional limitations into account in determining at step five whether Plaintiff is capable of performing other work in the national

⁴³See *Thompson*, 987 F.2d at 1491 (when evidence is inconclusive or when there is no evidence upon which the ALJ can make an RFC finding, the ALJ must exercise his/her discretionary power to order a consultative examination to determine the claimant's capabilities).

economy,⁴⁴ and must include those additional limitations in the hypothetical posed to the vocational expert.⁴⁵

d. Mental and other nonexertional impairments

Finally, Plaintiff contends that the ALJ erred in excluding certain other nonexertional impairments from Plaintiff's RFC. More specifically, Plaintiff argues that the ALJ improperly excluded that Plaintiff has "difficulty maintaining concentration for extended periods of time" and "require[s] an unreasonable amount of breaks during the workday."⁴⁶ Plaintiff asserts that evidence of these nonexertional impairments was provided by the "consulting physicians."⁴⁷

The record reveals that Plaintiff underwent a Mental Status Examination by a consulting psychologist, Robert W. Barnett, Ph.D. (*See* Tr. 132-35.) Dr. Barnett wrote in the report of his consultative exam that Plaintiff has "dysthymic disorder, late onset." (Tr. 133) He also wrote that Plaintiff "does not appear to be significantly intellectually limited" and that she "showed no difficulty with attention or concentration" during the mental examination and interview. (Tr. 133)

Another consulting psychologist, George Hough, Ph.D., completed a Mental Functional Capacity Assessment. (*See* Tr. 153-57) Dr. Hough found that Plaintiff is "moderately limited" in the ability "to maintain attention and concentration for extended periods." (Tr. 153) Dr. Hough also

⁴⁴*See Williams v. Bowen*, 844 F.2d 748, 751 (10th Cir. 1988) (at the fifth and final step, Commissioner must determine whether the claimant is able to perform other work that exists in the national economy).

⁴⁵As discussed below in Part D, any hypothetical posed to a vocational expert must include all of a claimant's limitations that are borne out by the evidence. *See Decker v. Chater*, 86 F.2d 935, 955 (10th Cir. 1996).

⁴⁶Pltf's Social Security Brief, doc. 13 at p. 24.

⁴⁷*Id.*

found that Plaintiff is “moderately limited” in her “ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.” (Tr. 154) Dr. Hough opined that Plaintiff “is capable of competitive level of employment from a psychiatric perspective” subject to the limitations described above. (Tr. 157)

Dr. Hough also completed a Psychiatric Review Technique Form (“PRT Form”), and in rating Plaintiff’s “impairment severity,” he found that Plaintiff “seldom” had “deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere”). Tr. 169. Dr. Hough noted on the PRT Form that Dr. Barnett had concluded Plaintiff is not intellectually limited and that Dr. Barnett had observed no particular problems with attention or concentration. (Tr. 171)

The ALJ concluded the following regarding Plaintiff’s mental functioning:

[T]here are several assessments of claimant’s mental functioning in the record including a mental status examination . . . that show that claimant was found to have a late onset of dysthymic disorder that was not disabling. Specifically, the psychologist [Dr. Barnett] found that claimant did not appear to be significantly intellectually limited and showed no difficulty with attention or concentration during the interview. A reviewing physician [Dr. Hough] corroborates this in the [PRT Form].

(Tr. 15)

The ALJ went on to make his RFC determination based on “all of the above.” Tr. 15. His RFC determination includes no mental limitations and no limitations regarding Plaintiff’s ability to concentrate or complete a workday without interruptions or rest periods.

Although the Court does not agree with the ALJ that Dr. Hough “corroborates” Dr. Barnett’s findings in all respects, it appears that the ALJ did weigh and consider Dr. Hough’s findings in

addition to Dr. Barnett's findings. Social Security Ruling 96-6p⁴⁸ and 20 C.F.R. § 404.1527(f) require that the ALJ consider the findings of any state agency psychological consultants regarding the nature and severity of a claimant's impairments. While the ALJ may not ignore the state agency psychologist's opinion and must explain the weight given to the opinion in his/her decision, the ALJ is not bound by the state agency psychologist's findings.⁴⁹ Here, the ALJ was entitled to give Dr. Barnett's opinions and findings greater weight than those of Dr. Hough because Dr. Barnett actually examined and interviewed Plaintiff.⁵⁰ (See Tr. 132-33.) Dr. Hough, on the other hand, merely drew his conclusion based on his review of the evidence in the file. (See Tr. 153.) Also, Dr. Barnett's opinion was consistent with the rest of the evidence in the record, as no treating or examining physician reported that Plaintiff had any of these limitations.

In sum, the Court finds that substantial evidence supports the ALJ's determination that Plaintiff does not suffer from any mental impairments and that she has no difficulty maintaining concentration or working without taking an unreasonable number of breaks. The ALJ therefore did not commit error when he did not include these limitations in his RFC determination.

D. Was the Hypothetical Posed to the Vocational Expert Legally Deficient?

Finally, Plaintiff argues that the hypothetical the ALJ posed to the vocational expert was legally deficient because it did not ask the vocational expert to take into account the nonexertional

⁴⁸1996 WL 374180, at *2 (July 2, 1996).

⁴⁹*Id.*

⁵⁰*See Winfrey v. Chater*, 92 F.3d 1017, 1022 (10th Cir. 1996) (ALJ is entitled to give more weight to the opinion of a physician or other source who has examined the claimant than the opinion of a physician or source who has not examined the claimant); 20 C.F.R. § 404.1527(d)(1) (Commissioner will "give more weight to the opinion of a source who has examined [the claimant] than to the opinion of a source who has not examined [the claimant]").

impairments arising from Plaintiff's alleged pain, fatigue, depression, and loss of bilateral grip strength.

1. *The ALJ's hypothetical*

The ALJ provided the following information in his hypothetical to the vocational expert:

Ms. Lumpe, I would like you to assume an individual the same age, education and work experience as the claimant in this case. I would like you to assume that this individual can lift and carry only 10 pounds on an occasional basis, negligible weights frequently. Can stand and walk for only 15 minutes at a time, for a total of two hours in an eight-hour day. Can sit with normal breaks and rest periods up to six hours in an eight-hour day. I would [sic] you to further assume that this individual is prohibited from the use of ladders, scaffolds, working in extreme heat or extreme cold, or any job that requires the rapid, repetitive use of the hands and arms. This individual can only occasionally stoop, kneel, crouch, crawl or use stairs.

(Tr. 202-203)

2. *Applicable law regarding hypotheticals*

The ALJ's hypothetical question to the vocational expert must reflect with precision all of the claimant's impairments that are substantially supported by the record.⁵¹ The ALJ need not, however, include every limitation claimed by the claimant, but only those that the ALJ finds exist based upon substantial evidence in the record.⁵²

3. *Alleged errors with respect to the hypothetical posed in this case*

a. *Failure to include pain and fatigue*

Plaintiff first asserts that the ALJ erred in failing to include in his hypothetical that Plaintiff suffers pain and fatigue as a result of her rheumatoid arthritis. The Court disagrees.

⁵¹*Decker v. Chater*, 86 F.3d 953, 955 (10th Cir. 1996).

⁵²*Id.* at 955; *Fiatte v. Comm'r of Social Security Admin.*, 258 F. Supp. 2d 1187, 1196 (D. Kan. 2003).

The ALJ found that Plaintiff's claims of disabling pain and fatigue were not fully credible. (Tr. 13-14, 16) Although the ALJ found that Plaintiff's arthritis may cause her some pain, he did not find it to be disabling so as to prevent her from performing a wide range of sedentary work. (Tr. 14,16). Plaintiff has not appealed the ALJ's credibility finding and she provides the Court with no basis for overturning the ALJ's credibility finding. Thus, that finding stands. Moreover, the ALJ found that the objective medical evidence did not support Plaintiff's claims of disabling pain and fatigue. (Tr. 14) Plaintiff does not appeal this finding either. As the ALJ did not find substantial evidence supported Plaintiff's claims of disabling pain and fatigue, he was under no obligation to include those factors in his hypothetical to the vocational expert.⁵³ Accordingly, no error occurred in this regard.

b. Failure to include limiting effects of depression

Plaintiff next contends that the ALJ should have included the limiting effects of Plaintiff's depression in his hypothetical. Plaintiff does not explain what "limiting effects" of the depression should have been included. The Court assumes, however, that Plaintiff is referring to her alleged inability to concentrate. As previously discussed,⁵⁴ the ALJ did not err in finding that Plaintiff has no difficulty with attention or concentration. (Tr. 15) In addition, the ALJ expressly found that Plaintiff's dysthymic disorder⁵⁵ was not disabling. (Tr. 15) Plaintiff does not appeal this finding, and she provides no basis for overturning it. Moreover, no medical records or tests indicate that

⁵³ See *Jordan v. Heckler*, 835 F.2d 1314, 1316 (10th Cir. 1987) (ALJ's failure to include pain factor in hypotheticals was not inappropriate because there was not sufficient evidence that plaintiff's pain prohibited him from performing light or sedentary work).

⁵⁴ See Part IV.C.3.d., *supra*.

⁵⁵ Dysthymic disorder is defined as a mood disorder that is manifested as depression. *Stedman's Medical Dictionary* 536 (26th ed. 1995).

Plaintiff's depression affects her ability to do work. Thus, the ALJ was not required to include any limitations flowing from Plaintiff's depression in his hypothetical.

c. Failure to include loss of bilateral grip strength

Lastly, Plaintiff argues that the ALJ erred because he failed to include in his hypothetical Plaintiff's loss of bilateral grip strength. The medical evidence indicates that Plaintiff has weakened grip strength. Dr. Sinnott's February 2000 report indicates that Plaintiff has stiffness and swelling in the hands "with weakening of grip of approximately 50%." (Tr. 123) His report also indicates that she has "difficulty holding and grasping without pain and weakness." (Tr. 123) While the ALJ's hypothetical did include Plaintiff's limited ability to lift,⁵⁶ it did not include her weakened grip strength. The two are clearly different limitations.

No other physician or medical source of record offers any contrary opinion regarding Plaintiff's grip strength. As Dr. Sinnott's opinion regarding Plaintiff's grip strength is not inconsistent with the other substantial evidence and is supported by my medically acceptable clinical techniques, the Court finds that it should be given controlling weight.⁵⁷ The Court therefore finds that Plaintiff's decreased grip strength should have been included in the ALJ's RFC assessment of Plaintiff and that it should have been addressed in the hypothetical posed to the vocational expert. The Court must therefore reverse and remand on this additional basis. Upon remand, the ALJ shall

⁵⁶The ALJ's hypothetical included the limitation that the individual "can lift and carry only 10 pounds on an occasional basis" and only "negligible weights frequently." (Tr. 203)

⁵⁷The Commissioner must give controlling weight to the opinion of a claimant's treating physician if it is "well supported by medically acceptable clinical . . . diagnostic techniques and is not inconsistent with the other substantial evidence." 20 C.F.R. § 404.1527(d)(2); *see also Drapeau v. Massanari*, 255 F.3d 1211, 1213 (10th Cir. 2001).

elicit vocational expert testimony that takes into account Plaintiff's decreased grip strength in order to determine whether sufficient jobs exist in the national economy that Plaintiff can perform.

V. Conclusion

For the reasons set forth above, the Court reverses the Commissioner's decision denying Plaintiff disability benefits and remands this action to the Commissioner to conduct further proceedings. On remand, the Commissioner shall determine whether Plaintiff suffers from any manipulative impairments, in addition to the found inability to rapidly and repetitively move her hands. If the ALJ determines that the medical evidence is inconclusive, the ALJ shall exercise his/her discretionary power to order a consultative examination. If the ALJ determines that Plaintiff suffers from additional manipulative limitations, the ALJ shall include those in his RFC assessment and elicit vocational expert testimony that takes into account those additional manipulative impairments. The ALJ shall also include Plaintiff's decreased grip strength in his RFC assessment and elicit vocational expert testimony that takes into account Plaintiff's decreased grip strength.

IT IS THEREFORE ORDERED that the decision of the Commissioner denying Plaintiff disability benefits is REVERSED and the case REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings in accordance with this opinion. This decision will dispose of this case, including Plaintiff's Complaint (doc. 1), which has been considered a petition for review.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 27th day of August 2003.

s/ David J. Waxse
David J. Waxse
U.S. Magistrate Judge

cc: All counsel and *pro se* parties